

In the United States Court of Appeals
for the Ninth Circuit

REGGARD SANTOS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of the Decision of the
Tax Court of the United States

BRIEF FOR THE RESPONDENT

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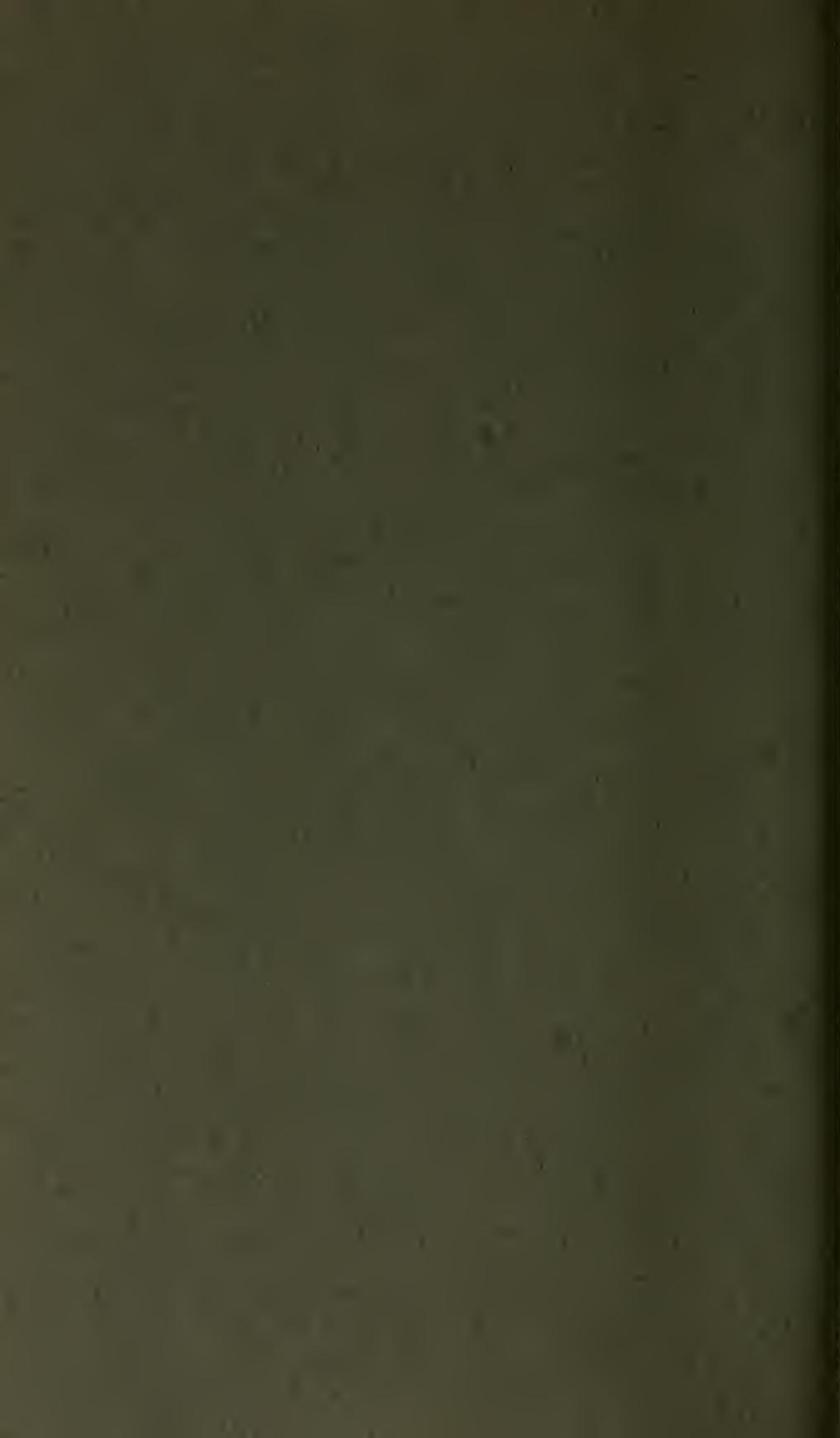
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No. 15866

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On Petition for Review of the Decision of the
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BRIEF FOR THE RESPONDENT

PREVIOUS OPINIONS

The first findings of fact and opinion of the Tax Court (F.R. 46-65)¹ are reported at 26 T.C. 571.

The former opinion of this Court is reported at 246 F. 2d 204.

The Tax Court's decision on remand (R. 7) and order denying motion to vacate (R. 14-15) are unreported.

¹ F.R. refers to the record in the first appeal, Docket No. 15371, which record is used herein by stipulation. (R. 19-20.)

JURISDICTION

This review involves a decision of the Tax Court (R. 7) holding that the taxpayer, Irmgard Santos, is not liable as transferee for the unpaid income taxes of her husband, Lawrence Santos, for the taxable years 1943 to 1946, inclusive. On June 18, 1956, the Tax Court had entered a decision that taxpayer was liable, as transferee of the assets of her husband, for income taxes for such years in the amount of \$68,287.90, plus interest. (F.R. 65-66.) Taxpayer filed a petition for review with this Court, Docket No. 15371, and in an opinion dated June 28, 1957, this Court reversed the decision of the Tax Court (246 F. 2d 204). Pursuant to the mandate of this Court (R. 4-5) further proceedings were had in the Tax Court which vacated its earlier decision and, on August 29, 1957, held the taxpayer was not liable as a transferee (R. 3, 7). Taxpayer's motion to vacate this decision (R. 8-10) was denied on December 6, 1957, and the order entered on December 11, 1957 (R. 14-15). The petition for review was filed January 20, 1958. (R. 17.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Whether the Tax Court was correct in its holding pursuant to the mandate of this Court that taxpayer was not liable as a transferee of assets of her husband and in refusing to find an overpayment of transferee liability.

STATUTES INVOLVED

The pertinent provisions of the statutes involved are set forth in the Appendix, *infra*.

STATEMENT

Only the factual matters relevant to this review will be recounted here. The full statement of facts appears in the Tax Court's original findings of fact and opinion (F.R. 46-65), and in the opinion of this Court in the first review of this cause, 246 F. 2d 204.²

On or before October 15, 1952, the Commissioner, under Section 311 of the Internal Revenue Code of 1939, made a jeopardy assessment against taxpayer, Irmgard Santos, as transferee of the assets of her husband, Lawrence Santos, in the principal amount of \$68,287.90, on account of income taxes owed by him for the years 1943-1946. Interest on the transferee liability was assessed on the same date in the amount of \$26,605.15. (F.R. 46-47; R. 12.)

In an earlier Tax Court proceeding involving the individual income tax liability of taxpayer it was determined pursuant to a stipulation of the parties that there were overpayments of her income tax for the years 1945 and 1946 in the principal amounts of \$24,768.51, and \$38,237.18, respectively. (R. 13.)

The overpayments of income tax for the years 1945 and 1946 referred to were applied by the District Director at Honolulu, Hawaii, against the assessed transferee liability. This was done by the entry of two credits on the books of the District Director on

² This opinion is set out as an appendix to taxpayer's brief.

December 30, 1954, one in the amount of \$27,256.32, and the other in the amount of \$49,835.15. These credits represented the amounts of the overpayments for the two years, plus interest, and they together with a cash payment of \$27.00 made on September 26, 1956, equalled the amount of the jeopardy assessment plus interest. (R. 11, 13.)

In the meantime, or on October 15, 1952, the Commissioner issued a notice of deficiency to taxpayer as transferee of the assets of Lawrence Santos. (F.R. 47.) On January 8, 1953, taxpayer filed a petition with the Tax Court for a redetermination of this deficiency and on June 18, 1956, the Tax Court approved the Commissioner's determination. (F.R. 46-65.) On September 7, 1956, the taxpayer petitioned this Court to review the decision of the Tax Court and this Court reversed, holding that the Commissioner had not sustained his burden of proving that the taxpayer had received certain assets as a transferee of her husband's individual property rather than as her share of community property. (Br. 11-14.) The mandate was filed August 13, 1957. (R. 4-5.)

In the meantime, or on August 7, 1957, the District Director at Honolulu reversed the above referred to credits of \$27,256.32 and \$49,835.15 and applied them against the income tax liability of Lawrence Santos for 1945. (R. 12.)

Thereafter, or on August 21, 1957, the Tax Court ordered its prior decision vacated and the proceeding was placed on the motions calendar. (R. 3.) On August 26, 1957, the Commissioner filed a motion for entry of decision finding that there is no liability on the part of taxpayer as transferee of the assets of

Lawrence Santos for income taxes for the taxable years 1943 to 1946, inclusive. This motion recited that no part of the assessed deficiency had been paid. (R. 6.) Decision was entered in accordance therewith on August 29, 1957. (R. 7.)

On September 6, 1957, taxpayer filed a motion to vacate the above decision and for the entry of a decision of an overpayment on account of the alleged transferee liability in the amount of \$77,118.47, including interest (R. 8-10.)

In an order entered December 11, 1957, the Tax Court denied the motion to vacate on the ground that there was no overpayment in this case because of the reversal of the credits in the account of Irmgard Santos, transferee. (R. 14-15.)

SUMMARY OF ARGUMENT

All activities by the Commissioner or on his behalf subsequent to the decision of this Court upon the first review of this case have been completely consistent with that decision. Accepting the taxpayer's premise that the property she received from her husband was community property and that therefore there was no transferee liability, the credits to taxpayer's transferee account were reversed and applied to the husband's account on the theory that under Hawaiian law all community property was subjected to and charged with debts incurred in the production of income for the community. Thus, there would have been no refund made to taxpayer even had an overpayment been determined by the Tax Court since the fund with which the overpayment was made was itself charged

with her husband's tax liability. If taxpayer disagrees with the disposition of the overpayment adjudged in her favor in the earlier Tax Court case covering the years 1945 and 1946, an adequate remedy by suit has been provided.

The Tax Court's decision on remand was correct because the facts before it showed there was no overpayment in this proceeding at the time such decision was rendered. Accordingly, pursuant to the mandate of this Court, the decision of no transferee liability and no overpayment was correct.

ARGUMENT

I

The Reversal of the Credits To the Taxpayer's Account As Transferee Was Neither Intended To Be Nor Was It In Fact In Contravention of This Court's Earlier Decision Herein

There is no dispute as to the material facts. A notice of deficiency was issued to taxpayer as transferee of the assets of her husband, Lawrence Santos covering income taxes due from him for the years 1943 to 1946, inclusive. (F.R. 47.) After a jeopardy assessment, taxpayer's account as transferee was credited to the extent of certain overpayments for the years 1945 and 1946 which had been determined in her favor in a prior Tax Court case. (R. 15.) The Tax Court upheld the determination of the Commissioner in the instant case that taxpayer was liable as a transferee of the assets of her husband, but pursuant to a petition for review filed by the taxpayer, this Court reversed the decision of the Tax Court and

sent the case back for further proceedings in conformity with its opinion and judgment. (R. 4-5.)

The position of the taxpayer throughout was that the assets she admittedly received from her husband were not from his separate property so as to make her liable for his taxes as a transferee, but rather were merely the receipt of her share of community property under the controlling Hawaiian law. Thus, this Court phrased the issue in the first review as, "whether the Commissioner maintained his burden of proof that this money was not her community property and was received by her without consideration." 246 F. 2d 204, 205.

The Commissioner's position, pursuant to this Court's decision, was, of course, to accept the fact which has not been disproved, i.e. that the assets transferred to the taxpayer were in fact her share of community property. But, in addition, the Commissioner also took the position that since the same Hawaiian law which gave her these community rights also by Section 13(c) of the Community Property statute³ made this type of community property sub-

³ Section 13(c) of the Community Property statute of Hawaii provides:

(c) The community property shall be liable for debts contracted by the husband or by the wife or by both, and for liabilities of the husband or the wife or both arising out of tort or otherwise, in any transaction entered into or action taken by the husband or the wife or both relating to the management or control or disposition of or other dealing with or for the protection or benefit of the community property. With respect to the liability of community property for such debts and liabilities, no distinction shall be made be-

ject to and chargeable with the debts incurred in producing such community income, including the husband's liability for federal income taxes, then the assets transferred to taxpayer went to her charged with this latter liability. Accordingly, when it was determined that the assets were community property another fund was uncovered from which the husband's delinquent taxes could be collected. The statutory charge thus imposed has the effect of making the property itself primarily liable for the payment of the husband's taxes as debts earned in the production of community income.

The sense of Section 13(c) of the Community Property statute is obviously that when debts are incurred in the production of income which becomes community property by the operation of law, the community property shall be burdened with the discharge of these debts. Therefore, it was the Commissioner's position that the overpayment of taxpayer's 1945-1946 taxes, *which was directly traceable to assets of the community* (F.R. 52-54), should be directly applied to the husband's debts. This position was in no way a reassertion of the transferee liability contention rejected by this Court, and accordingly, could in no sense be said to be in contravention of this Court's opinion in the first proceeding.

Under the approach to the problem above outlined, the only question then presented was as to the correct procedural method to be followed in applying the over-

tween community property subject to the management and control of the wife and community property subject to the management and control of the husband.

payments to the husband's tax liability. Two possibilities were apparent: (1) To have an overpayment entered in this, the transferee proceeding, and subsequently refuse to make a refund on the ground that the assets were liable for and should be applied to the husband's unpaid tax liability; or (2) to reverse the credits in the transferee account and apply them to the husband's account directly on the same theory. The latter alternative was chosen (R. 13), herein.

It should be noted that in either alternative the taxpayer has the same remedy, i.e. a suit for refund allowed by Section 322(c) of the Internal Revenue Code of 1939, Appendix, *infra*,⁴ which provides that no suit for refund can be brought after petitioning the Tax Court *except* where a decision of overpayment by the Tax Court has become final.⁵ Under either of the above alternatives, this situation exists. Thus, if an overpayment was entered in this case, the taxpayer could sue for a refund under this provision when the Commissioner refused to refund the overpayment. On the other hand where the credits to the transferee account are reversed, it leaves the situation exactly the same, i.e. a decision of the Tax Court determin-

⁴ It would appear that this is the applicable statute herein. However, in all material respects it is the same as Section 6512(a) of the Internal Revenue Code of 1954 cited by taxpayer. (Br. 6-7.)

⁵ Taxpayer apparently does not recognize the application of this exception to Section 6512(a) since she alleges (Br. 6-7) that she will be without remedy unless an overpayment is found in this case. There is no substance to this objection because as pointed out above, there is still a decision of an overpayment that has become final.

ing an overpayment for the years 1945-1946 has become final and therefore suit will lie if the refund is not made.

Thus, even if the better procedure would have been to have allowed an overpayment to be entered in this case as taxpayer urgently requests (Br. 9), the entry of that overpayment would not have entitled taxpayer to a refund nor prevented the necessity of a suit for refund to adjudicate the correctness of the Commissioner's position. In any case only the Court of Claims or the proper District Court and not the Tax Court has the jurisdiction to compel a refund of taxes. See Section 322(d), Internal Revenue Code of 1939, Appendix, *infra*. It should be pointed out that a taxpayer's right to bring a suit for refund in this situation has received judicial approval. When the refund of an overpayment determined by the Tax Court is not made by the Commissioner for what appears to be some justifiable reason, the taxpayer's right to receive the refund is the proper subject of a suit in the District Court or Court of Claims—"And in such a suit the Commissioner may secure a final adjudication of his right to withhold the overpayment determined by the Board, * * *." *U. S. ex rel. Girard Co. v. Helvering*, 301 U.S. 540, 543. To the same effect see *Empire Ordnance Corp. v. Harrington*, 249 F. 2d 680 (C.A. D.C.).

It is submitted that the procedure involved in this case was clearly permissible. The Commissioner's authority to reverse credits previously allowed has been specifically approved. *Commissioner v. Newport Industries*, 121 F. 2d 655 (C.A. 7th); *American Woolen Co. v. United States*, 18 F. Supp. 783, and

21 F. Supp. 1021 (C. Cls.). On rehearing of the last cited case the Court of Claims said (21 F. Supp., p. 1023): "Further argument, however, has convinced us that the Commissioner had the right to reverse the credit. * * * We think the right of the Commissioner to change his records is sustained by the decision of the Supreme Court in the case of *Daube v. United States*, 289 U.S. 367, * * *."

That the action of the District Director in reversing the credits herein was not in disregard of the decision of this Court is readily apparent. As explained above the theory on which the credits were reversed and applied to the husband's tax liability was based solely on the decision of this Court. If the theory applied is incorrect that fact must be proved in a suit for refund of the overpayments involved. Moreover, it is noteworthy in this regard that (after delivery of the mandate of this Court) the Commissioner himself moved the Tax Court to find there was no transferee liability (R. 6), hardly evincing, as taxpayer urges (Br. 5), a design by the Commissioner to avoid the same holding by this Court.

In view of the above, it is submitted that the reversal of the credits involved herein was within the authority of the Commissioner, was based on this Court's earlier decision, and has not in any way prejudiced the rights of the taxpayer.

II

The Tax Court Did Not Err In Determining There Was No Overpayment of Transferee Liability

On August 29, 1957, the Tax Court, pursuant to the mandate of this Court (R. 4-5), and, pursuant to

the motion of the Commissioner (R. 6), vacated its earlier decision that taxpayer was liable as a transferee of the assets of her husband and entered a decision of no transferee liability (R. 7). Later, on September 6, 1957, the taxpayer moved to vacate the decision of August 29, 1957, and for the entry of a decision of no transferee liability and an overpayment in the principal sum of \$77,118.47. (R. 8-10.) On December 6, 1957, the Tax Court denied this last referred to motion of the taxpayer with the statement "that there is no overpayment in this proceeding at this time." (R. 14-15.)

The inflammatory statements in taxpayer's brief (pp. 7-8) to the effect that the Tax Court was deliberately flaunting the mandate of this Court by the above outlined action are simply untrue. The Tax Court has jurisdiction under Section 322(d) of the Internal Revenue Code of 1939, Appendix, *infra*, to determine only the amount, if any, of an overpayment. In this case the only payment of the transferee liability occurred when the earlier overpayments in favor of the taxpayer for the years 1945 and 1946 were credited to the transferee account. After the credits had been reversed, the transferee liability had not been paid in any sense and the Tax Court's decision that there was no overpayment was entirely correct. The Tax Court could not have ordered the credits reinstated in the transferee account because it has no jurisdiction over the Commissioner's administrative actions in general. (*Commissioner v. Gooch Co.*, 320 U.S. 418; *Glowinski v. Commissioner*, 243 F. 2d 635 (C.A. D.C.); *Jones v. Commissioner*,

34 B.T.A. 280), and, specifically it cannot direct the Commissioner to credit an overpayment in a given manner, nor can it compel the Commissioner to pay over to a taxpayer in cash the amount thereof. *Heyl v. Commissioner*, 34 B.T.A. 223; *W. H. Hill Co. v. Commissioner*, 22 B.T.A. 1351, 23 B.T.A. 605, affirmed, 64 F. 2d 506 (C.A. 6th); *Anderson v. Commissioner*, 12 B.T.A. 1111.

Consequently, under the mandate of this Court which directed the Tax Court to have such proceedings as were in conformity with this Court's opinion and judgment, the Tax Court correctly held herein that there is no transferee liability and no over payment. Moreover, as we have pointed out above, if the taxpayer desires to litigate the correctness of the Commissioner's administrative action a proper and adequate statutory proceeding has been provided therefor.

CONCLUSION

For the reasons above submitted, the decision of the Tax Court is correct and should be affirmed.

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APPENDIX

Internal Revenue Code of 1939:

SEC. 322. REFUNDS AND CREDITS.

* * * *

(c) Effect of Petition to Tax Court.

If the Commissioner has mailed to the taxpayer a notice of deficiency under section 272(a) and if the taxpayer files a petition with The Tax Court of the United States within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As to overpayments determined by a decision of the Tax Court which has become final; and

* * * *

(d) [as amended by Sec. 5(c), Tax Adjustment Act of 1945, c. 340, 59 Stat. 517] Overpayment Found by Tax Court.

If the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of tax in respect of such taxable year, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall when the decision of the Tax Court has become final, be credited or refunded to the taxpayer. * * *

(26 U.S.C. 1952 ed., Sec. 322.)

Revised Law of Hawaii (1945):

Chapter 301A [as added by Act 273, Session Laws of Hawaii (1945)]. COMMUNITY PROPERTY.

* * * *

Sec. 13. Property subject to obligations. (a) The separate property of the wife shall be liable for debts contracted at any time by the wife and liabilities of the wife arising at any time out of tort or otherwise, including any such debts or liabilities by reason of any transaction entered into or action taken by the wife relating to the management or control or disposition of or other dealing with or for the protection or benefit of the community property, but shall not be liable for debts or liabilities of the husband.

(b) The separate property of the husband shall be liable for debts contracted at any time by the husband and liabilities of the husband arising at any time out of tort or otherwise, including any such debts or liabilities by reason of any transaction entered into or action taken by the husband relating to the management or control or disposition of or other dealing with or for the protection or benefit of the community property, but shall not be liable for debts or liabilities of the wife.

(c) The community property shall be liable for debts contracted by the husband or by the wife or by both, and for liabilities of the husband or the wife or both arising out of tort or otherwise, in any transaction entered into or action taken by the husband or the wife or both relating to the management or control or disposition of or other dealing with or for the protection or benefit of the community property. With respect to the liability of community property for such debts and liabilities, no distinction shall be made be-

tween community property subject to the management and control of the wife and community property subject to the management and control of the husband.

(d) As between the community property and the separate property of the wife or of the husband the community property shall be liable for the debts and liabilities referred to in paragraph (c) of this section.

(e) The earnings of the wife and the rents, issues, incomes and other profits of the separate property of the wife shall be liable for debts contracted by the wife prior to the inception of the community and the liabilities of the wife arising prior to the inception of the community out of tort or otherwise.

(f) The earnings of the husband and the rents, issues, incomes and other profits of the separate property of the husband shall be liable for debts contracted by the husband prior to the inception of the community and the liabilities of the husband arising prior to the inception of the community out of tort or otherwise.

(g) As between the community property and the separate property of the wife or of the husband, the separate property shall be liable for the debts and liabilities referred to in paragraphs (e) and (f) of this section. For the purposes of said paragraphs (e) and (f) the inception of the community shall be the marriage of the husband and wife or the effective date of this chapter, whichever is the later.

(h) Nothing in this section shall be deemed to affect or modify the obligation of the husband to support his wife and family and to discharge all debts contracted by the wife for necessaries for herself and family during marriage; *provided*,

however, that if and whenever there is community property available for such purpose the husband shall be entitled to resort to such community property rather than to his separate property.

(i) Nothing in this section shall be deemed to prevent the wife or the husband from mortgaging or pledging her or his separate property or to prevent the wife and the husband from joining in a mortgage or pledge of community property as security for any indebtedness whether of the wife or of the husband or both.

